SUPREME COURT
STATE OF FLORIDA

CASE NO. 94-

On Appeal from District Court of Appeal, Fifth District of Florida L.T. Case No. 93-02461

JOSEPH GUPTON,

Petitioner,

vs.

VILLAGE KEY AND SAW SHOP, INC.,

Respondent.

PETITIONER'S JURISDICTIONAL BRIEF

Geoffrey B. Dobson
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I N D E X

CITATIONS OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

This action is before the Court on Notice of Invocation of Discretionary Jurisdiction filed August 10, 1994 to review the decision of the District Court of Appeal, Fifth District of Florida, in Village Key and Saw Shop, Inc. v. Joseph Gupton, _____ So.2d _____, 1994-1 Trade Cas. (CCH) P.70,607, 19 F.L.W. (D) 1275, (Fla. 5th DCA 1994) as being in direct and express conflict with the decision of another District Court or of the Supreme Court. A copy of the trial court decision is included in the Appendix as (A-1), a copy of the decision sought to be reviewed is affixed as (A-7) and a copy of the denial of rehearing is affixed as (A-10). In its decision, the Fifth District Court determined that the 1990 amendment to 542.33, Florida Statutes, is not applicable to non-compete agreements which were entered into in 1989 and holding that the defense of unreasonableness of a non-compete agreement in a general sense relied upon by the trial court, rather than the heretofore limited defenses of unreasonableness as to (1) time and (2) area, is not applicable to the present case.

ARGUMENT

WHETHER THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN VILLAGE KEY AND SAW SHOP, INC. v. GUPTON, _____ So.2d _____, 1994-1 Trade Cas. (CCH) P.70,607, 19 F.L.W. (D) 1275, (Fla. 5th DCA 1994) IS IN DIRECT AND EXPRESS CONFLICT WITH THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN HAPNEY v. CENTRAL GARAGE, INC., 579 So.2d 127 (Fla. 2nd DCA 1991), REVIEW DENIED, 591 So.2d 180 (Fla. 1991).

In the decision below the Fifth District Court of Appeal specifically held, relying on Chandra v. Gadodia, 610 So.2d 15 (Fla. 5th DCA 1992), review denied 621 So.2d 432 (Fla. 1993), that the 1990 amendments to Florida Statutes 542.33 are not applicable to a non-compete agreement entered into in 1989. The Court noted that the trial court applied the amended version of Florida Statutes 542.33 in deciding the case and found the restrictions as contained in the non-compete agreement generally unreasonable. Additionally, based on the 1989 statute, the Fifth District Court of Appeal held *"The only authority the court possesses over the terms of a noncompetition agreement is to determine reasonableness of the time and area limitations."*

In Hapney v. Central Garage, Inc., 579 So.2d 127 (Fla. 2d DCA 1991), review denied 591 So.2d 180 (Fla. 1991), the Second District Court of Appeal specifically held that the 1990 amendments to Florida Statutes 542.33 were applicable to contracts which were entered into prior to the 1990 statute's effective date on the basis:

> *"Remedial statutes, which do not create new or take away vested rights but only further existing rights, are to be applied retrospectively. Ziccardi v. Strothger, 570 So.2d 1391 (Fla. 2d DCA 1990). Included in the category are statutes governing the burden of proof in*

> *civil actions. Walker & LaBerge, Inc. v. Halligan, 344 So.2d 239 (Fla. 1977); Stein v. Miller Indus. Inc., 564 So.2d 539 (Fla. 4th DCA 1990); see also, Dep't of Agric. & Consumer Servcs. v. Bonanno, 568 So.2d 24 (Fla. 1990). The right created by section 541.12, and carried forward in section 542.33(2)(a), is to enter into a covenant not to compete in derogation of the common law. Procedurally the statute, from its inception, has provided that such contracts may be enforced by injunctive relief. Chapter 90-216 merely refines the relief available by categorizing the burden of proof in relation to the protectable interest at issue, and clarifies that the general principles of equity shall apply in this class of cases. The underlying substantive right is not affected. The statue is therefore remedial and may be applied retrospectively."*

Thus, in the instance below, the Fifth District Court has held that the trial court may not consider the reasonableness of the restrictive covenant in general since the 1990 amendments to the statute are not applicable to a contract entered into prior to its effective date, while the Second District Court of Appeal in Hapney has held that the amendments to the statute are applicable to contracts entered into prior to that date. The Second District Court of Appeal in Hapney held at 579 So.2d 127 at 133 that a test of reasonableness is injected into the enforcement process because of the amendment prohibits the enforcement of an unreasonable covenant and further held that the restrictions that had been previously announced in Xerographics, Inc. v. Thomas, 537 So.2d 140 (Fla. 2d DCA 1988), and Sarasota Beverage Co. v. Johnson, 551 So.2d 502 (Fla. 2d DCA 1989), were eliminated in light of the Court's determination that "the intent of the Legislature was to authorize the courts to apply traditional equitable principle in cases of this nature to avoid unfair and unjust results as urged by Justice

Overton in his dissent in Keller [v. Twenty-Four Collections, Inc. 419 So.2d 1048 (Fla.1982)]."

Thus, Hapney directly holds that the 1990 amendments are applicable to contracts entered into prior to the amendments' effective date and that the amendments prohibit enforcement of an unreasonable covenant and further holds that prior restrictions limiting trial courts to review only of the duration and geographic area are no longer applicable. In contrast, the Fifth District Court of Appeal has held that the amendments are not applicable to contracts entered prior to their effective date and that the defense of unreasonableness is not available and that the only authority the court possesses over a non-competition agreement is the determination of reasonableness of time and area limitations, specifically holding that Xerographics, Inc. v. Thomas is still valid and enforceable law. In summary, then, the Gupton decision below is in express conflict with Hapney in three regards: (1) as to the applicability of the 1990 amendments to contracts entered prior to that date; (2) the availability of the defense of unreasonableness of the covenants; and (3) whether Xerographics, Inc. v. Thomas, 537 So.2d 140 (Fla. 2d DCA 1988), is still valid law, notwithstanding that it will no longer be followed by the Second District Court of Appeal itself.

In the decision below, the Fifth District Court of Appeal relied on its earlier decision of Chandra v. Gadodia, 610 So.2d 15 (Fla. 5th DCA 1992), review denied 621 So.2d 432 (Fla. 1993). In Chandra the Fifth District Court of Appeal at 610 So.2d at 17 specifically noted that its conclusion is in conflict with Hapney:

"We likewise disagree with the above conclu-

sion reached in Hapney, reverse the trial court's refusal to grant Chandra's request for temporary injunction, and respectfully reach conflict with Hapney for the reasons discussed below."

The United States Court Circuit Court of Appeals for the Fourth Circuit has noted the contrast between the Second District Court of Appeal and the Fifth District Court of Appeal with regard to non-competition agreements. PHP Healthcare Corporation v. EMSA Limited Partnership, 14 F.3d 941; 1993-2 Trade Cas. (CCH) p. 70, 453 (4th Cir. 1993), noted in footnote 5:

"The Hapney decision, by a split panel of Florida's intermediate appellate court for the Second District, found implicit in the statute another condition to covenant enforceability not literally expressed: the existence of a 'legitimate business interest' in the employer that the covenant protects. The critical effect of such a requirement would be to disallow covenants that protect only against 'competition per se', i.e., that did no more than meet the basic durational, area, and 'like business' requirements. See Hapney, 579 So.2d at 130-31. There apparently is a split of authority on this specific question among the Florida intermediate appellate courts, see Chandra v. Gadodia, 610 So.2d 15 (Fla. Dist. Ct. App. 1992), review denied, 621 So.2d 432 (Fla. 1993) (contra), that the Florida Supreme court has not directly addressed.

"Though the parties have argued the issue and its application here extensively, and though the district court based its decision in part on its conclusion that the requirement exits and was not meet here, see J.A. 711-12, we decline to address it. As will appear, we believe the covenants were unenforceable against the Millington physicians in the way asserted by EMSA whether or not such an additional requirement is implicit in the statute. Accordingly, we avoid addressing this potentially critical, unresolved interpretive issue of Florida statutory law, but note in passing that two federal district courts required to address it have accepted the Hapney court's interpretation. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hagerty, 808 F.Supp.

1555 (S.D. Fla. 1992), aff'd 2 F.3d 405 (11th Cir. 1993); MedX, Inc. v. Ranger, 788 F.Supp. 288, 290-91 (E.D. La. 1992)." (Emphasis supplied)

In MedX, cited by the Fourth Circuit Court, a United States District Court has held that Hapney *"authorized the courts to apply traditional equitable principal [sic] in cases of this nature to avoid unfair and unjust results, as urged by Justice Overton in his dissent in [Keller v. Twenty-Four Collections, Inc., supra]."*

This case and the question posed, however, goes beyond the mere question of conflict in the interpretation of the statute between two Districts. It represents a conflict in philosophy as to (1) an employee oriented philosophy of whether non-compete agreements should be interpreted narrowly and strictly as being in derogation of the philosophy of the Common Law that restrictions on the ability to earn a living constitute an improper restraint of trade and will be permitted only to the extent specifically authorized by legislation; see Hapney, supra, Love v. Miami Laundry Company, 118 So. 32, 118 Fla. 137 (1935); and that an employee should be permitted to avail himself of all equitable defenses, including "clean hands," prior breach of contract, general unreasonableness of the covenants, etc. or (2) the opposing employer oriented philosophy that a party's contract will be strictly enforced by injunction and that equitable restrictions on the enforceability of a contract should be narrowly and strictly construed. See Jewett Orthopaedic Clinic v. White, 629 So.2d 922 (Fla. 5th DCA 1994). In other words, a conflict exists between the different District Courts of Appeal even in the interpretation and

application of the 1990 amendments. This leaves trial courts to wrestle with the matter, including not only trial courts in Florida but United States District Courts, as above indicated, throughout the United States applying Florida law to contracts of this nature. Employment contracts govern practically all employment relationships and, thus, the impact of this conflict and how these contracts and the statutes permitting them are to be interpreted affect the vast bulk of citizens of the State of Florida. As can be indicated by the cases cited above and as indicated by the United States Circuit Court of Appeals for the Fourth Circuit, this a "critical" issue which has not yet been resolved.

Jurisdiction should be accepted.

CONCLUSION

For the reasons indicated above the decision for the Fifth District Court of Appeal is in direct and express conflict with the decision of the Second District Court of Appeal in Hapney, supra. The question is one which has proven to be critical resulting in diverse decisions by United States District Courts as well as the District Courts of Appeal and the trial courts of this state in the correct interpretation to be given to the 1990 amendments to the Florida Statutes relating to non-compete agreements.

Respectfully submitted,

DOBSON, CHRISTENSEN & BROWN, P.A.

By: _____
Geoffrey B. Dobson
Florida Bar No. 0019919
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VOICE: (904) 824-9032
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to David M. Andrews, Esquire, P. O. Box 5358, St. Augustine, Florida 32085 by United States Postal Service, postage prepaid, this 12th day of August, A. D., 1994.

_____

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IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR ST. JOHNS COUNTY, FLORIDA

CASE NO.: 92-1468CA
DIVISION: 56

VILLAGE KEY & SAW SHOP, INC.,

Plaintiff,

vs.

JOSEPH GUPTON,

Defendant.
_____/

FINAL JUDGMENT

THIS CAUSE, was before the Court September 1, 1993 on proceedings involving enforcement of a purported "non-complete" agreement arising out of a locksmith and alarm business. The Trial involved the testimony of the parties, the attorney who drafted the transfer of business. The facts were not in material dispute. The Defendant was originally the owner of a locksmith-alarm business known as J&M. It was individually owned by Defendant. Plaintiff at the same time was President and principal stockholder of Plaintiff, VILLAGE KEY & SAW SHOP, a Corportion.

During early and mid 1989, Defendant began to experience some cash flow and other financial problems. He was unable to fund new equipment in order to continue in the lucrative alarm monitoring systems. This results from a business selling and installment of security systems in home and business. After installation a monitoring system company is retained by the alarm installer. The central system bills the locksmith and the locksmith bills the home or business owner. This insures a recurring income after a security system is in place. The local locksmith also maintains and adjusts the system for the consumer. A key factor in the equation is to maintain customer lists so the periodic billings for the monitoring phase continues. If the user customer uses a different local locksmith business, the lucrative continuing revenue is lost.

In the instant case, Defendant had been engaging in this type of business most of his adult life. Because he had difficulty funding equipment and installation supplies he was in contact with the Plaintiff about a purchase-sale of his business; or as the Defendant put it, "a merger." The business effect was the same.

Documents including a Bill of Sale (Plaintiff's Exhibit 1); note for payment to the Defendant and related documents were exchanged. Much was made over the date, since they were apparently "back-dated" to be effective May 1, 1989, but were signed May 28, 1989.

A key instrument was that Defendant was to be an employee of the new owner, VILLAGE KEY (Plaintiff). He was to be hired at a salary of $320.00 per week. Although not stated in the document, he also received commissions of 5% for alarm systems sold and an additional 5% if Defendant obtained the contract for the installation as well. An employment agreement was simultaneously entered into between the parties. The agreement provided for a mutual ability of either to terminate the employment. However, the key point in the dispute arises out of the provision in this contract to the effect if Defendant terminates for any reason or is discharged for any reason, he will not compete for a period of five (5) years from TERMINATION, or cessation of employment.

The Court further found by the evidence a clear and unambiguous obligation on the part of the Plaintiff (Buyer) to take over certain bills and accounts of the Defendant's former business, as well as pay a note of $30,000.00 in installments with interest. At no time was there any evidence submitted that Plaintiff acted in bad faith or did anything to circumvent the obligations imposed by the transfer documents. Clearly, either party could end the employment at their own desire and for their own reason, requiring only a minimal 15 days notice. Much testimony was presented by Defendant that he was unhappy because about the time he quit, his brother who worked in the office was terminated because he could not keep up with the paper work of the business. Also, Defendant claimed Plaintiff hired a couple, the husband being a professional sales person who increased sales immediately. Defendant claimed he got into a dispute over this and a claim he was not paid sufficient commissions on a new-home subdivision (Island Hammock).

During the transition of ownership to Plaintiff, Plaintiff paid off the accounts of Defendant which were approximately between

$12,000.00 to $15,000.00. The note of $30,000.00 to Defendant was to pay for existing customer monitoring services. Plaintiff complied with all of its requirements.

However, because of the reasons mentioned, Defendant decided to leave the employment, which he did on June 30, 1992. He claimed no back pay, loss of commission or any financial debt owed him by Plaintiff. Upon leaving the employment, he did not actively solicit the existing customers now being processed by VILLAGE KEY (Plaintiff). However, a few left VILLAGE KEY when Defendant left and sought him out for services, which he undertook. He also entered into a competing business out of his home, which centered around working locally for a large company that nationally advertised the sale and installation of alarm systems. They sought contacts from consumers. They needed local services to install their equipment in order to establish a monitoring base. Defendant became the local agent to do the work. Although he worked out of his home, this was not the type of business in direct conflict with Plaintiff. This is because the national company was advertising on their own for their own special security equipment. They only needed a local installer to put in the systems. Most of Defendant's compensation resulted from this activity. Also, he was required to travel out of county for installations for this Company, known as NATIONAL GUARDIAN.

The Court concludes there was ample consideration for the enforcement of a valid covenant not to compete as enunciated in CRISS v. PRESSER, 494 So.2d 525 (Fl App 1DCA 1986). However, if the covenant not to compete deprived the Defendant of a right to earn a living and feed his family, Florida Courts have rejected such provisions as "unfair" and "overreaching," due to disparate financial positions of the parties. See SUN ELASTIC CORP. v. O. B. INDUSTRIES, 603 So.2d 516 (3 DCA 1992). However, as enunciated in SUN ELASTIC, id. the Courts ARE REQUIRED to enjoin violations of non-competitive agreements which are reasonable as to its duration and geographic limitation.

Further, the Court concludes there is nothing unique or special about locksmith work. Systems are generally of simple design, having "breaker locations" around entrances and windows to structures. When the contacts are broken, the wire or remote systems trips off the alarm, which is monitored through phone lines at a central location. Contact can be made at the business or residence through phone, or if necessary police can be dispatched. The Court finds nothing unusual

about the business activity of either Plaintiff or Defendant.

Florida law recognized this anamoly and has placed FLORIDA STATUTE 542.33 on the books to recognize Court decision in this area. Basically, the statute clearly permits injunction in non-compete clauses if the restriction is against specific trade secrets, customer lists, or direct solicitation of existing customers. This is presumed to constitute irreparable injury subject to injunctive relief. Plaintiff has urged that this be enforced. Defendant claims the entire restriction against Defendant be rejected.

Admittedly, Defendant sought out one customer on the customer lists made part of the Bill of Sale (Exhibit 1). A few other customers sought out the Defendant and he undertook to service them.

Plaintiff does not seek damages, but only an injunction to prevent Defendant from invading the customer lists transferred to Plaintiff by Defendant in 1989. It is clear to the Court that this request is fair and equitable. Plaintiff has complied with its bargain, and Defendant should also.

However, the Court is also faced with the conclusion it should not create a restraint that would enjoin Defendant from earning a living. However, this should be fashioned to prevent Defendant from further invading customer lists of the Plaintiff. The Court also concludes notwithstanding the strict wording of the contract which would effectively put the Defendant out of any ability to engage in locksmith or alarm system work, this is not to be enforced by the Court. Insofar as the time period is concerned, the Court concludes five (5) years from separation of employment is not unreasonable since the Court has invaded many of the strict terms of the restriction to avoid Defendant from being deprived of a living.

The Court further finds there has been no overt or wilful effort on the part of Defendant to invade the customer lists sold by him to Plaintiff in 1989. A few customers have chosen to seek him out and one he solicited.

Accordingly, it is ADJUDGED:

1. Plaintiff is entitled to limited relief by way of permanent injunction under the employment contract terminated at the option of Defendant on or about June 30, 1992.

2. The Court concludes that the effect of this Order shall not extend beyond June 30, 1997.

3. Defendant is permanently restrained and enjoined from

violating, attempting to violate, or in any way interfering with the following:

(a) Using any specific trade secrets developed by Plaintiff during the period of time from and after May 1, 1989 until the termination of this Order.

(b) Direct solicitation of any of the customers or successor in ownership interest of all customers, firms, business or other entitities listed on the Bill of Sale and other transfer documents effective May 1, 1989 signed May 28, 1989 until the termination of this Order.

(c) The restraint in (b) above shall pertain to any locksmith and alarm business, maintenance, servicing, installation repairs or related matters.

(d) Because the Defendant did not solicit the customers who transferred their business to the Defendant, this Order shall not be deemed to apply to them. Those are as listed as follows:

Rosemary Aeschbach
Allsafe Boat & RV
Richard Archer
Joan Broudy
City Gates Shop
Corpus Christi Parish & Rectory
Coral Landing
Robert Johnson
Jr. Department Store
Donna Katz
Lucille Shop
Mr. Migliaccioi
Lonnie Pomar
John Redmond
Runk Construction
Mrs. Stevens
Sunburst Trading
James Theodore
Keith Gibbs
Gudrun Hopfgartner

4. Each party shall bear their own legal fees since neither plead for the same. The Court retains jurisdiction to tax costs.

ORDERED in St. Augustine, St. Johns County, Florida this 20th day of September, 1993.

RICHARD G. WEINBERG, CIRCUIT JUDGE

Copies to:

David M. Andrews, Esquire
Geoffrey B. Dobson, Jr., Esquire

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1994

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

VILLAGE KEY & SAW SHOP, INC.,

Appellant,

v.

CASE NO. 93-2461

JOSEPH GUPTON,

Appellee.

_____/

Opinion filed June 10, 1994

Appeal from the Circuit Court
for St. Johns County,
Richard G. Weinberg, Judge.

David M. Andrews, St. Augustine,
for Appellant.

Geoffrey B. Dobson of Dobson, Christensen
& Brown, P.A., St. Augustine, for Appellee.

PER CURIAM.

Village Key & Saw Shop, Inc. (Village) appeals the final judgment in favor of defendant below, Joseph Gupton, which judgment was entered after a non-jury trial on Village's complaint alleging Gupton's breach of a noncompete clause. Village urges the trial court erred by only partially enforcing the noncompete clause and contends that, pursuant to section 542.33, Florida Statutes (1993), it was entitled to have Gupton enjoined from entering the locksmith and alarm business once the court determined the time and space restrictions of the noncompete clause were reasonable.

Although not noted by either party, because the contract was entered into in 1989, the 1990 amendment to section 542.33 is not applicable. See Chandra v. Gadodia, 610 So. 2d 15, 19 (Fla. 5th DCA 1992), review denied, 621 So. 2d 432 (Fla. 1993) (holding that the 1990 amendment is to be applied prospectively only and noting that the 1990 amendment now requires evidence of irreparable injury and makes available "a defense of unreasonableness in a general sense rather than the heretofore limited defenses of unreasonableness as to (1) time and (2) area"). The applicable version, section 542.33(2)(a), Florida Statutes (1989) provides in relevant part:

> [O]ne who is employed as an . . . employee may agree with his employer to refrain from carrying on or engaging in a similar business and from soliciting old customers of such employer within a reasonably limited time and area . . . so long as such employer continues to carry on a like business therein. Said agreements may, in the discretion of a court of competent jurisdiction, be enforced by injunction.

Unfortunately, because the parties failed to bring the pre-1990 version of the statute to the court's attention, the trial court applied the amended version when deciding the case.[1] It found the restriction generally unreason-

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[1] Chapter 90-210, section 1, Laws of Florida, amended section 542.33(2)(a), effective June 28, 1990 by adding the following language to the statute:

> However, the court shall not enter an injunction contrary to the public health, safety, or welfare or in any case where the injunction enforces an unreasonable covenant not to compete or where there is no showing of irreparable injury. However, use of specific trade secrets, customer lists, or direct solicitation of existing customers shall be presumed to be an irreparable injury and may be specifically enjoined. In the event the seller of the goodwill of a business, or a shareholder selling or otherwise disposing of all his shares in a corporation breaches an agreement to refrain from carrying on or engaging in a similar business, irreparable injury shall be presumed.

able and decided to enjoin defendant only from further invading Village's customer lists. Under the 1989 statute, "[t]he only authority the court possesses over the terms of a noncompetition agreement is to determine reasonableness of the time and area limitations." Xerographics, Inc. v. Thomas, 537 So. 2d 140, 143 (Fla. 2d DCA 1988). If the trial court disagreed with either limitation, the trial court was free to determine and substitute a reasonable term. Dorminy v. Frank B. Hall & Co., Inc., 464 So. 2d 154 (Fla. 5th DCA 1985). Sub judice, rather than fashioning a reasonable area or time restraint, the trial court permitted Gupton to continue in competition with Village, limited only by the restriction that Gupton not "further" invade Village's customer lists. Accordingly, we reverse and remand for proceedings consistent with this opinion.

REVERSED and REMANDED.

DAUKSCH, GOSHORN and GRIFFIN, JJ., concur.

FILED JUL 15 1994

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT

VILLAGE KEY AND SAW SHOP, INC.,
Appellant,

v. CASE NO. 93-2461

JOSEPH GUPTON,
Appellee.

DATE: July 14, 1994

BY ORDER OF THE COURT:

ORDERED that Appellee's MOTION FOR REHEARING OR CERTIFICATION, filed June 23, 1994, is denied.

I hereby certify that the foregoing is
(a true copy of) the original court order.

FRANK J. HABERSHAW, CLERK

BY: _____
Deputy Clerk

(COURT SEAL)

cc: Geoffrey B. Dobson, Esq.
David M. Andrews, Esq.